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# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 862

PERCY C. MAGNUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 1a-7a) is reported at 365 F. 2d 1007.

### JURISDICTION

The judgment of the court of appeals was entered on September 20, 1966 (Pet. 8a). A petition for rehearing *en banc* was denied on October 14, 1966. On November 2, 1966, Mr. Justice Harlan extended the

time for filing a petition for a writ of certiorari to and including December 13, 1966. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTIONS PRESENTED

1. Whether the district court committed reversible error in instructing the jury on the element of willfulness.

2. Whether, under the doctrine of *Sansone* v. *United States*, 380 U.S. 343, the jury's acquittal of petitioner on the counts alleging willful attempts to evade income taxes required his acquittal on the counts alleging willful failure to pay income taxes for the same years.

## STATUTES INVOLVED

Internal Revenue Code of 1954:

> Section 7201. *Attempt to evade or defeat tax.*—Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> [26 U.S.C. 7201.]

> Section 7203. *Willful failure to file return, supply information, or pay tax.*—Any person required under this title to pay any * * * tax, or

> required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or section 6016) * * * who willfully fails to pay such * * * tax, make such return, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.
>
> [26 U.S.C. 7203.]

## STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of New York under Sections 7201 and 7203 of the Internal Revenue Code of 1954 for (1) willfully attempting to evade income taxes, (2) willfully failing to file timely income tax returns, and (3) willfully failing to pay the tax when due (R. 8a-14a). There were three separate counts for each offense, each relating to the years 1955, 1956 and 1957, respectively (*ibid*). After a three-week jury trial petitioner was convicted on the three counts charging willfull failure to pay, and was acquitted on the other six counts (R. 2054a-2056a). He was sentenced to concurrent prison terms of six months on each of the three counts (R. 2166a, 2169a). The court of appeals unanimously affirmed (Pet. 1a-7a).

Petitioner is the president and principal stockholder of Magnus, Mabee & Reynard, Inc., which manufactures oils and aromatic chemicals (Pet. 5).

He did not file a timely individual income tax return for any year from 1948 through 1957 (R. 231a-235a, 281a-287a). On September 15, 1959, after the Internal Revenue Service had begun an investigation, he filed returns for 1955 through 1957 (R. 234a-235a, 889a-890a). He had filed returns for 1951 through 1954 a few days before and he filed returns for 1948 through 1950 in September 28, 1960 (R. 281a-284a). In 1959, 1960 and 1961, petitioner paid taxes of $342,855.55 and interest of $140,381.48 for the years 1948 through 1957 (Govt. Exs. 7A-9A, 18A-24A). Petitioner's reported income for the prosecution years, as shown by the delinquent returns, exceeded $375,000 (Govt. Exs. 1, 2, 3, 100), and the taxes which he had failed to pay were approximately $87,000 (Govt. Exs. 1, 2, 3, 7A, 8A, 9A; R. 314a-316a, 1108a-1109a).[1]

Since petitioner conceded his failure timely to pay the taxes for the years 1955 through 1957, the only issue under the counts on which he was convicted was whether such failure was willful. The evidence on this issue was as follows:

In the spring of 1958 a revenue agent who was examining one of the corporation's income tax returns asked to see the canceled checks reflecting payment of petitioner's personal income tax for 1956 (R. 515a-516a, 888a-891a). When the checks could not be found, the agent suggested that petitioner should make a thorough audit of his finances

[1] Petitioner had about $73,000 withheld from his corporate salary (Govt. Exs. 1, 2, 3; R. 1108a-1109a).

(R. 901a-902a). Such an audit was undertaken, and as a result petitioner's accountants about March, 1959 proposed "new" returns, which were not filed until six months later (Govt. Exs. 1, 2, 3, 14 through 17; R. 1346a-1347a). Petitioner also filed an affidavit stating that he believed that F. Clifford Cummings, Comptroller of the corporation from 1949 through July, 1958, had timely filed the returns for those years, but that since the Internal Revenue Service had informed him to the contrary he had instructed his accountants to prepare another set of returns.

Cummings testified that he prepared petitioner's returns for all calendar years between 1948 and 1957; that each year he submitted them to petitioner for signature and informed him how much tax was owing; that after signing the returns petitioner returned them, and that he (Cummings) then put them in his outgoing mail basket for mailing; and that he had no idea why the Service had not received them (R. 464a, 468a, 524a-525a, 528a, 533a-534a, 625a-626a). Cummings testified further that petitioner never gave him a check for the tax due and never instructed him to draw such a check (R. 524a-526a), and that he had no authority to sign checks on petitioner's personal bank accounts (R. 462a-463a). George McGlynn, the treasurer of the company, testified (as a defense witness) that he did have authority to sign checks on petitioner's personal bank account, and that he would draw personal checks for petitioner only if instructed to do so (R. 1408a-1410a, 1557a-1558a). Neither Cummings nor McGlynn could recall drawing any checks covering petitioner's taxes

for the years 1948 through 1957 (R. 473a-474a, 796a-806a, 1513a-1521a, 1534a-1541a).

Petitioner testified that he believed that his federal income tax returns were timely filed for the years 1948 through 1957, and that checks for the taxes due were submitted with the returns (R. 1719a-1721a, 1729a, 1747a-1748a); that he had thought that Cummings and McGlynn would take care of drawing these checks, and that McGlynn had signed them (R. 1694a); that, although he received his various bank statements in the mail, he paid little or no attention to them or to the state of his accounts (R. 1750a-1751a); and that when Cummings presented the returns for his signature each year he signed them without looking at or discussing them (R. 1695a-1696a, 1750a-1752a). The trial judge charged the jury that if they believed petitioner's testimony, they must acquit on the failure-to-pay counts (R. 1988a-1989a).

## ARGUMENT

1. Petitioner contends (Pet. 16-22) that the trial court committed reversible error in giving the jury the following instruction on willfulness (R. 1987a-1989a):

> Therefore, with respect to these Counts 3, 6 and 9, the only issue for you to decide is whether or not defendant's failure to pay the tax at the time that it was due was wilful. As I have said, a wilful failure means a conscious, deliberate and purposeful failure as opposed to an unconscious, unwilling, negligent or mistaken fail-

ure. However, with respect to the charge contained in Counts 3, 6 and 9, there must be something more than a conscious, deliberate and purposeful failure in order to constitute wilfulness. There must be a failure with an evil motive, a want of justification in view of all the financial circumstances of the taxpayer.

A defendant must know that he was obligated to pay a tax. In this case defendant, as I recall it, testified in substance that he was aware of that fact, hence there is no dispute as to that aspect.

In determining whether or not defendant's failure to pay the federal income taxes for the years 1955, 1956 and 1957 on or before their respective due dates was or was not wilful, you may consider all the evidence that you believe to be relevant on that issue.

Defendant testified that he signed the returns for those years and that he believed that Mr. Cummings and Mr. McGlynn would take care of drawing and signing the checks, which it was their job to do. He testified that he paid little or no attention to his bank statements or to the state of his bank account which he said Mr. McGlynn supplemented from time to time by arranging for the deposition in the bank account of loans to defendant from Magnus, Mabee & Reynard, loans which were repaid at the end of each year. If you believe defendant's testimony, you must return a verdict of not guilty on these Counts 3, 6 and 9.

He argues that in charging that there must be a "failure * * * with an evil motive, a want of justification," the court departed from *Spies* v. *United States*, 317 U.S. 492, 498, which he reads as requir-

ing an instruction that there be "failure * * * with an evil motive *and* a want of justification" (emphasis supplied).

The statement in *Spies* upon which petitioner relies, however, does not require such an instruction. The question is that case was whether proof that a taxpayer willfully had failed to file a return and willfully had failed to pay a tax (both misdemeanors) was sufficient to establish the felony of willfully attempting to evade or defeat the tax. In holding that it was not—that the felony involves "some willful commission in addition to the willful omissions that make up the list of misdemeanors" (p. 499)—the Court stated (p. 498, emphasis added) that:

> * * * in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case *to include some element of evil motive and want of justification* in view of all the financial circumstances of the taxpayer.

This statement was, of course, dictum. In any event, it does not follow that because willfulness in the context of such a failure to pay includes "some element" of evil motive and want of justification, the jury always must be charged that the government has to show both of these factors. On the contrary, the statement in *Spies* appears designed only to make it clear that where there has been no willful failure

to file a return, something more than a knowing and intentional default in paying the tax is required to show a "willful" failure to do so, *i.e.*, that some element of affirmative wrongful intent also is necessary. The two factors of "evil motive" and "want of justification" are interrelated, and the existence of the latter frequently will be probative of the former as well. Indeed, this Court specifically pointed out in *Spies* (p. 499), in illustrating the kind of affirmative conduct that would suffice to establish the more serious offense of willful attempt to defeat and evade—a felony—that "[i]f the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *A fortiori*, the offense of willful failure to pay—only a misdemeanor—is established by proof of evil motive, and there is no need further to show some independent want of justification.

The court's charge in the present case satisfied this requirement. For the court told the jury that "there must be something more than a conscious, deliberate and purposeful failure in order to constitute wilfulness." Petitioner's defense was that his failure to pay was not willful because he believed that the taxes had in fact been paid. Petitioner testified that he had made Cummings and McGlynn responsible for paying his personal taxes; that he had assumed that they had paid the taxes when due; and that, because of the scant attention he gave to his bank statements, he was not aware of their failure to do so. The trial court, after summarizing this testimony, instructed

the jury that if they believed it they must acquit. In the light of these instructions the jury, by finding petitioner guilty on the failure to pay counts, necessarily concluded that such failure was willful in the statutory sense of involving an evil intent.

2. There is no merit to petitioner's attack (Pet. 29-32) upon that portion of the charge which stated that payment in 1959 of the taxes for 1955, 1956 and 1957 was "not a defense to the charge" of willful failure to pay those taxes when they were due (R. 1987a). Petitioner argues that this instruction prevented the jury from considering such belated payment on the issue of his willfulness. But petitioner reads the sentence out of context, and in the light of the entire charge this statement was intended only to inform the jury that such belated payment was not enough, in itself, to show lack of willfulness and thus to warrant an acquittal. The court pointed out that the government did not have to prove the precise figures shown in the indictment; that it was undisputed that petitioner owed some taxes for 1955, 1956 and 1957 and that he had not paid them on time; that the mere fact of ultimate payment was not a defense to the charges; and that the only issue for the jury to decide was whether petitioner's failure to make timely payments had been willful (R. 1986a-1987a). The court then carefully defined willfulness and told the jury that it could take into account all the evidence it considered relevant on that issue (R. 1987a-1988a) —an instruction which, the court of appeals noted (Pet. 6a), left the jury free to consider any evidence

in the record on that issue.[2] There was accordingly no need for petitioner's requested supplemental instruction that the jury could consider the fact of ultimate payment as bearing on the issue of willfulness (R. 2006a-2008a).

3. Petitioner contends (Pet. 22-29) that under *Sansone* v. *United States*, 380 U.S. 343, his acquittal on the counts charging the felony of willfully attempting to evade and defeat taxes also required his acquittal of the misdemeanor of willfully failing to pay taxes. This argument ignores a critical distinction between this case and *Sansone* which, under the latter's rationale, fully justifies petitioner's conviction on the misdemeanor counts.

In *Sansone* a taxpayer was indicted and convicted for the felony of willfully attempting to evade taxes, and the question was whether the jury should have been instructed that it could acquit him of that offense but convict him of the lesser misdemeanor of willfully filing a false return or willfully failing to pay taxes. The taxpayer had made certain gains on the sale of property which concededly he did not report in the returns he filed, and the issue at the trial was whether his understatement of income in his returns was willful. The Court held that no instruction on the lesser-included offenses was necessary. Noting that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element

[2] As petitioner points out (Pet. p. 11), his counsel argued to the jury that the late payment was evidence of petitioner's good faith (R. 1912a).

which is not required for conviction of the lesser-included offense" (p. 350), the Court ruled that since it was undisputed that petitioner had filed a false return and the only issue was whether such act was willful, the felony and the lesser-included misdemeanors "covered precisely the same ground" (*Berra* v. *United States*, 351 U.S. 131, 134). That is, if the jury found that the filing of the false return was willful, petitioner would have committed both the felony and the misdemeanors, whereas if the jury found that it was not willful, he would have committed neither. In other words, "there were no disputed issues of fact which would justify instructing the jury that it could find that petitioner had committed all the elements of either or both of the * * * misdemeanors without having committed * * * the § 7201 felony" (*Sansone*, 380 U.S. at 354-355).

In the present case, however, there was "a disputed factual element which is not required for conviction of the lesser-included offense" (*Sansone*, 380 U.S. at 350). In support of the felony charge of attempting to evade or defeat taxes, the government contended that petitioner committed the affirmative act of evasion of "showing to agents of the Internal Revenue Service of 'retained copies' of petitioner's federal tax returns for the indictment years as proof to those agents that the originals had been filed and the income tax paid as stated thereon, when allegedly petitioner knew that the original returns had not been filed and the taxes had not been paid" (Pet. 28, fn. 12). Whether such conduct constituted an affirmative act of evasion under the felony counts was a

factual question for the jury, and the jury resolved that issue in petitioner's favor. But since no affirmative act of evasion is required for the misdemeanor of willful failure to pay taxes *(Spies v. United States, supra)*, the jury could convict on the misdemeanor counts even though it acquitted on the felony counts. Thus, in the present case, unlike *Sansone*, the jury could "find that petitioner had committed all the elements of * * * the * * * misdemeanors without having committed * * * the § 7201 felony" (380 U.S. at 354-355), since the latter required proof of an affirmative act of evasion that the misdemeanors do not require.

Petitioner argues (Pet. 25-29) that his prosecution for both the felony and the misdemeanor was inconsistent with the government's prosecutorial policy as stated in its brief in this Court in *Sansone*. But that statement, like any statement of general policy, was necessarily subject to some exceptions; it was not designed to announce an absolutely inflexible standard. In any event, petitioner was not prejudiced by his prosecution for both offenses. As we have shown, there was in this case the contested factual issue whether petitioner had committed an affirmative act of evasion. Thus, even if petitioner had been indicted solely for the felony—as he apparently claims he should have been—either he or the government would have been entitled under *Sansone* to an instruction on the lesser-included misdemeanor offense; and the jury then could—and presumably would—have reached the identical result that it did here, *i.e.*, acquit him of the felony but convict him

of the misdemeanor. In the circumstances, petitioner was not prejudiced as a result of his having also been indicted for the misdemeanor.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

MITCHELL ROGOVIN,
*Assistant Attorney General.*

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
*Attorneys.*

JANUARY, 1967.

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